

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

OTIS STEWART, JR.

Respondent.

HUDALJ 98-8054-DB(LDP)

HUDALJ 99-9061-DB

Decided: November 8, 2001

David A. Sullivan, Esq.  
For the Respondent

Clara J. Delay, Esq.  
For the Government

Before: WILLIAM C. CREGAR  
Acting Chief Administrative Law Judge

**HEARING OFFICER'S  
RECOMMENDED DECISION ON LIMITED DENIAL OF PARTICIPATION  
AND FINDINGS OF FACT ON PROPOSED DEBARMENT**

This proceeding arose pursuant to 24 C.F.R. Part 24 as a result of 1) the March 26, 1998, imposition of a Limited Denial of Participation ("LDP") in programs of the Department of Housing and Urban Development ("the Department," "the Government," or "HUD") for one year by the Director, Birmingham Multifamily Program Center, of HUD's Alabama State Office, and 2) a May 27, 1999, proposal by HUD's Director of the Enforcement Center to debar Respondent from future participation in HUD procurement and non-procurement programs as either a participant or a principal with HUD and throughout the Executive Branch of the Federal Government for four years. On December 3, 1999, I consolidated the two cases. A hearing was held in Birmingham, Alabama on March 14-15 and July 17-18, 2000. Post hearing briefs were filed on March 19, 2001. Subsequently, I requested additional information from the parties. This information having been submitted, this case is ripe for decision.

### Procedural History

On April 22, 1998, Respondent requested a hearing on the March 26, 1998, LDP. On May 12, 1998, this matter was set for a hearing to be held on June 16, 1998. On June 5, 1998, I granted the parties' joint request to extend the hearing date to allow the parties to settle the case through mediation. The hearing was reset to commence on August 18, 1998. During the course of settlement negotiations Respondent learned that HUD was preparing to propose a debarment on grounds similar, in part, to those forming the basis for the LDP. In order to avoid duplicative proceedings, on August 7, 1998, I granted Respondent's unopposed request to indefinitely stay the proceedings pending HUD's issuance of a proposed debarment.

On April 8, 1999, Respondent requested that the indefinite stay be lifted as HUD had taken no action to debar him. On April 16, 1999, I ordered the Department to show cause why the stay should not be vacated. The Department responded to the Order and moved to dismiss the now expired LDP asserting that the proposed debarment was now "immanent." Having determined that the practical effect of the passage of approximately seven months without issuance of the proposed debarment denied Respondent a prompt adjudication, on May 3, 1999, I vacated the stay, and ordered that the hearing commence on June 15, 1999.

On May 27, 1999, HUD issued Respondent a Notice of Proposed Debarment, which Respondent promptly contested. Following this, on June 9, 1999, I granted Respondent's unopposed motion for consolidation of the LDP and proposed debarment proceedings and for a second stay of proceedings pending consolidation. On November 10, 1999, the proposed debarment was referred to me by the Debarring Official's Designee for findings of fact on four specified issues. On December 3, 1999, I ordered the consolidation of the two proceedings and set the hearing date for March 14, 2000. The hearing commenced on March 14<sup>th</sup> and continued through the next day. At the conclusion of the taking of evidence on the second day, the parties agreed with my assessment that serious allegations of discrimination and attempted favoritism raised at the hearing required the taking of additional evidence in order to provide the Debarring Official's Designee with a more adequate record on these issues. Accordingly, the hearing was recessed and was reconvened on July 17-18, 2000. Post hearing briefs were to have been submitted on September 22, 2000. Subsequently, I approved multiple unopposed requests for extensions of the date for the filing of post hearing briefs. Post hearing briefs were filed on March 19, 2001.

On August 15, 2001, I issued an Order requesting further information and briefing from the parties on an issue not fully resolved. The Order was reissued on September 5, 2001, because one of the parties had not received the original order. The parties responded to the Order and the case is now ripe for final decision.

## Background

Respondent Otis Stewart is the President and sole stockholder of Perimeter Investments, Inc. ("Perimeter"), the owner of the Prince Hall Apartments ("Prince Hall" or "project"), a 180-unit apartment complex. Prince Hall's primary mortgage was insured by HUD under Section 221(d)(3) of the National Housing Act. 12 U.S.C. § 1715(l)(3). In October 1988, HUD approved the transfer of Prince Hall's physical assets from the prior owner Prince Hall Apartments, Inc. (a non-profit corporation) to Perimeter (a limited dividend corporation).

At the time of the transfer of assets, the project was under two mortgages through HUD: the primary mortgage was a 1970 mortgage assigned under Section 221(g)(4), and the second was a 1980 Section 241 loan. As a condition precedent for obtaining continued HUD mortgage insurance for the project, Respondent was required to agree to the terms and conditions set forth in a Regulatory Agreement for Multifamily Housing Projects ("Regulatory Agreement"). Paragraph 8 of the Regulatory Agreement specifically stated that the new owner, Perimeter, "shall not file any petition in bankruptcy ...." Among other provisions, the Regulatory Agreement also required that Respondent abide by applicable rules and regulations promulgated by HUD, that he maintain the project in a safe and sanitary condition, and that he fully and properly account for all funds collected for the project including tenant security deposits.

By the end of the first year of new ownership, problems began to arise with the project. Beginning in 1989 and continuing off and on throughout the remaining years of ownership, Respondent failed to fully fund the tenant security deposit account. Within approximately two years of the transfer, indicators of health and safety deficiencies arose at the project as well. In 1990 or 1991, a shooting victim died in front of the Prince Hall sign. The media reported that the man was shot at Prince Hall. The adverse publicity surrounding the incident resulted in the loss of some tenants who could afford to leave, with a resulting loss of project income. Tr-1, p. 354.<sup>1</sup> In April 1990, Respondent requested assistance from HUD to pay a delinquent water bill. HUD authorized the release of funds from the project's reserve for replacement ("RR") account to prevent the local Water Board from disconnecting the project's water. HUD rejected a September 25, 1990, request for another withdrawal from the RR account to board windows of vandalized units. As of April 1, 1991, Respondent was delinquent in payments on the primary mortgage. Resp. Ex. 16. On July 8, 1991, and again in August 1991, Respondent requested a 24-month moratorium on mortgage payments to pay delinquent water bills and other obligations. HUD refused the requests and suggested Respondent

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<sup>1</sup>The following reference abbreviations are used in this decision: "Tr-1" or "TR-2" followed by a page number for the transcripts from hearing one or hearing two; "Govt. Ex." for Government's Exhibit; "Resp. Ex." for Respondent's Exhibit, and "F.F." for finding of fact.

consider tendering a deed in lieu of foreclosure instead. Respondent refused. Govt. Ex. 11.

HUD attempted various rehabilitation efforts to save the project, including a work-out agreement and providing Respondent assistance in applying for available subsidies and additional mortgages. Govt. Exs. 11, 13-17; Tr-2, pp. 29, 50-51, 55, 124-26. Respondent's application for a loan management set aside was rejected because it was too poorly prepared; his application for a Flexible Subsidy was rejected because it was incomplete. On another occasion he simply failed to apply for available funding under the loan management set aside program. Govt. Ex. 11; Tr-2, pp. 29-30, 55-58. During the same period of time, Respondent made various requests and proposals for payment moratorium, waiver of fees, prepayment, and tenant buy-out, among other things. Govt. Ex. 11; Resp. Exs. 7 and 8; Tr-1, pp. 354-56, 414-18, 450-51. HUD rejected them all because Respondent failed to comply with conditions precedent or requirements for such requests, particularly in providing complete and necessary information. Govt. Ex. 11; Tr-1, pp. 368-70, 420-22, 452-53.

On September 1, 1992, the parties entered into a provisional workout agreement requiring Respondent to make a minimum monthly payment of \$5,395 and physical improvements to the project in the amount of \$750,876. Respondent also agreed that he would not oppose or interfere in any way should HUD demand possession of the project as a result of a default. Respondent specifically agreed that he would not seek bankruptcy protection under any section of the Bankruptcy Code that would effectively interfere with HUD's taking possession of the project. Respondent failed to make the required monthly payments. Consequently, the workout agreement was not extended and expired on August 31, 1993. Govt. Exs. 11, 13, 18; Resp. Ex. 16; Tr-2, pp. 22-23.

In January 1994, HUD issued a Notice of Limited Denial of Participation against Respondent claiming that he misused project funds, including the claim that he failed to properly fund the tenant security deposit account. At an informal conference held in connection with the LDP, Respondent indicated that the tenant security deposit account was not yet fully funded; consequently the LDP was affirmed. The LDP expired on July 7, 1994. Govt. Exs. 5, 11.

On January 5, 1995, HUD foreclosed on and then purchased the subject project. However, in blatant violation of the regulatory and work-out agreements, Respondent prevented HUD from taking possession of the project by filing bankruptcy earlier that same morning. Between January and October 1995, the validity of the foreclosure was at issue. In October 1995 the bankruptcy court determined that the foreclosure and sale were valid and that HUD was the owner of the project, and in December 1995 the bankruptcy suit was finally dismissed. However, HUD did not acquire physical possession of the property for another two and one-half years (although HUD rules

authorize it to take possession of property when defaulted or foreclosed property is not voluntarily released. *See* HUD Handbook 4315.1, Rev-1, Chapter 2). In 1996 and 1997 Respondent filed several subsequent legal actions in United States district court against HUD, including a second bankruptcy case, a discrimination case, and appeal of the original bankruptcy decision.

On September 10, 1997, HUD obtained possession of the project pursuant to a consent order between the Respondent, the trustee in bankruptcy, and HUD.

At a conference between Respondent and HUD Alabama Office officials held on February 1, 1994, Respondent admitted that the security deposit was not fully funded. The underfunded amount at that time totaled approximately \$13,000. Govt. Ex. 5.

After the HUD Alabama Office obtained possession of the property in 1997, it attempted to obtain an accounting of the tenant security fund from the agent it had hired to manage the property. The best that the agent could do was to attempt a reconstruction of the amount that should have been in the account based upon a review of tenant rent cards. The agent inferred the amount of the security deposit from the rents for each occupied unit as reflected on the rent cards. A list of these imputed deposits, totaling \$16,836, was sent to HUD. This list was the best information available to HUD on the project's tenant security deposits. Based upon this itemized list, on January 28, 1998, HUD sent Respondent a letter demanding that Respondent either remit \$16,836, or dispute any identified amounts on the list, as well as remit reports of monthly income and expenses for the two prior years. Govt. Ex. 1. Respondent did not reply to this letter. Indeed, Respondent never did provide evidence that he had properly funded the tenant security deposit account or kept records of it.<sup>2</sup> Govt. Ex. 1; Tr-I, pp. 34-38, 41-42, 166, 521-525. The instant LDP and Debarment actions resulted from Respondent's refusal to comply with these demands.

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<sup>2</sup>Respondent testified that he responded to HUD's requests for an accounting prior to the January 28, 1998 letter, by filing monthly reports showing expenses, revenues, and money in the security deposit account, but was not sure how he filed them. He later testified that he responded but that he was "not sure what his response was at that time." Tr-I, pp. 518, 521. He admits that he did not respond to HUD's January 28, 1998, demand claiming that he did not do so because he wanted a hearing. Tr-I, pp. 511, 516, 521. I do not credit Respondent's testimony. He has provided no evidence at hearing that he ever responded to HUD's requests for an accounting of the Tenant Security Deposits. His explanation that he did not respond to the January 28, 1998 letter because he wanted a hearing is less persuasive an explanation than that his failure to respond resulted from the brute fact that he could provide none. His explanation that all of his records were turned over to the Trustee in Bankruptcy also lacks credibility. HUD's demands for an accounting in 1993 preceded the bankruptcy proceeding by two years. Tr-I, pp., 71, 166.

## RECOMMENDED DECISION ON LIMITED DENIAL OF PARTICIPATION

### Statement of the Case

In its January 28, 1998 letter to Respondent, HUD informed Respondent that HUD had not yet received evidence of the security deposit funds of the residents and demanded that Respondent remit the amount of \$16,836 within ten days. The letter further informed Respondent that he should notify HUD within ten days if he disputed the amount or the list upon which it was based. Finally, the letter asked Respondent to also provide monthly reports of all income and expenditures of the apartments from January 1, 1995 through July 22, 1997. Respondent did not respond to the letter in any way.

As a result, on March 26, 1998, HUD issued Respondent a Notice of Limited Denial of Participation. The reasons for the sanction were that Respondent had failed to reimburse HUD for tenant security deposits in the amount of \$16,836 for the Prince Hall Apartments. These deposits were not found in the accounts when HUD took possession on September 11, 1997 and had not been provided in the more than 30 days since the January 1998 demand letter.

After an informal conference and affirmation of the LDP by the Birmingham HUD office, Respondent appealed and requested a hearing by letter dated April 22, 1998 (*see* 24 C.F.R. § 24.713).

### Findings of Fact

1. Respondent Otis Stewart is the President and sole stockholder of Perimeter Investments, Inc. (Perimeter), the owner of the Prince Hall Apartments ("Prince Hall or "project"), a 180-unit apartment complex.
2. Prince Hall's primary mortgage was insured by HUD under Section 221(d)(3) of the National Housing Act ("the Act"), 12 U.S.C. § 1715(l)(3), and the second mortgage was insured by HUD under Section 241 of the Act. In October 1998, HUD approved the transfer of Prince Hall's physical assets from the prior owner Prince Hall Apartments, Inc. (a non-profit corporation) to Perimeter (a limited dividend corporation).
3. As a condition precedent for obtaining continued HUD mortgage insurance for the project, Respondent was required to agree to comply with the Department's rules, regulations, and methods of operation applicable to the insured project. 12 U.S.C. § 1715 (d). Some of these requirements are part of the terms and conditions set forth in a Regulatory Agreement for Multifamily Housing Projects ("Regulatory Agreement"), which Respondent signed. Govt. Ex. A. Other rules are set forth in HUD Handbooks.

4. Under paragraph 9(g) of the Regulatory Agreement and HUD Handbook 4350.3, Chg-22, ¶ 4-10, Respondent was required to establish and maintain a tenant security deposit account and records therefor.

5. HUD foreclosed on the property on January 5, 1995, however Respondent's bankruptcy filing earlier the same day kept the validity of the foreclosure in question until the bankruptcy court ruled on October 31, 1995. HUD's January 1995 foreclosure on the property was validated and HUD became the responsible owner of the project. Nevertheless, Respondent maintained possession of the property until September 11, 1997, during pending litigation.

6. Respondent did not provide to HUD at any time the monies he had collected as tenant security deposits and which he was required to turn over to HUD upon transfer of ownership, pursuant to the Regulatory Agreement. Respondent also did not provide to HUD an accounting of those funds or an explanation of why he did not turn over the funds.

7. Because Respondent failed to provide records or other accounting of the monies collected as tenant security deposits, HUD was unable to determine the exact amount of money that should have been in the tenant security deposit account. HUD, therefore, attempted to recreate the amount by comparing rental prices and tenant residency records. As a result of this recreation, HUD determined that Respondent owed \$16,836 in tenant security deposits.<sup>3</sup> This amount was computed using tenant records up through August 1997. Govt. Ex. 1.

### Discussion

An LDP is a limited type of debarment. The purpose of all debarments imposed by agencies of the federal government, including debarments, suspensions, and LDPs imposed by HUD, is to protect the public interest by precluding persons who are not

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<sup>3</sup>In testimony, pre-hearing documents and post-hearing briefs, Respondent disputed this amount and the assertion that he owed any monies. He stated that not all tenants had paid security deposits, and some tenants had defaulted on rents, thus forfeiting their security deposits. These would have been permissible uses of the security deposits under HUD regulations. Respondent also stated that he had used some of the security deposits to cover normal operating costs because improper HUD actions had caused revenue to fall. This would not have been a permissible use of security deposits pursuant to HUD regulations. See Regulatory Agreement, paragraph 6(g), and HUD Handbook 4370.2, Rev-1, Chapter 2, Section 9, entitled "Security Deposit Account." In addition, Respondent stated that both an accounting of the funds and all remaining security deposit monies had been turned over to the bankruptcy trustee and that the bankruptcy trustee had turned over all monies, including any security deposits, to HUD as part of the Consent Order of September 10, 1997. Respondent made none of these statements to HUD in response to the January 28, 1998 demand letter, and provided no evidence in support of these assertions through the course of this proceeding.

"responsible" from conducting business with the federal government. 24 C.F.R. § 24.115(a). *See also* *Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. *See* 24 C.F.R. § 24.115.

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. § 24.305; *Gonzales v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964); 48 Comp. Gen. 768 (1969). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. *See Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D.Colo. 1989). The test for whether a sanction is warranted is present responsibility, although lack of present responsibility may be inferred from past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 939 (1958). The Government bears the evidentiary burden of demonstrating by adequate evidence that cause for the LDP exists, that the LDP is in the public interest, and that it was not imposed for punitive purposes. 24 C.F.R. § 24.705. Adequate evidence is defined in applicable regulations as "information sufficient to support a belief that a particular act or omission has occurred." 24 C.F.R. § 24.105(a).

Respondent's actions with regard to the tenant security deposit account in this case have amply demonstrated that there is substantial risk that the government would be injured in the future by doing business with the Respondent. The LDP is thus justified. Respondent had previously been issued an LDP in 1994 for failing to properly fund the tenant security deposit account, yet did nothing to correct that deficiency in the following years. In addition, Respondent by his own admission misused at least some of the funds in the security deposit account, to the detriment of both the tenants who had paid the security deposits and HUD, who then became liable for those missing monies when it assumed ownership of the project. HUD, pursuant to its own regulations, would subsequently be required to reimburse tenants for security deposits they were owed. As HUD had not received any monies from Respondent, it would therefore have to make any such reimbursements from other monies. Thus, an injury to HUD has been demonstrated.

There is no evidence that Respondent's failure to respond to HUD's demand letter of January 28, 1998, and his failure to provide the monies or an explanation regarding them was involuntary or precluded by some reasonable and legitimate reason. Respondent's wilful refusal to cooperate, combined with his admitted misuse of tenant funds when operating costs became difficult to meet, and his failure to provide any funds at all to HUD even as token security deposits indicates that the government would be at



risk of similar injuries in doing business with Respondent in future. The LDP was limited to one year and was clearly based upon a sufficiently serious and long-standing infraction of the rules. It is therefore evident that cause for the LDP exists, that the LDP is in the public interest, and that the LDP was not imposed for punitive purposes.

Although the amount owed as asserted by HUD appears to have been calculated by HUD using tenant records up to 1997, instead of up to October 31, 1995 when HUD became the owner of the property, the fact that Respondent failed to meet his obligations regarding the tenant security deposit account does not change because the amount is incorrect. Respondent failed to abide by the terms of the Regulatory Agreement when he did not provide HUD with an accounting of tenants' security deposits and with the monies he had collected up through October 31, 1995. He also had a responsibility to keep account of and to remit to HUD any additional security deposits he might have collected after October 31, 1995, while he was still in possession of the property even though he no longer owned the property. His failure to do so supports imposition of the LDP.

Accordingly, it is ORDERED that

The LDP of March 26, 1998, is affirmed. However, the \$16,836 amount is deleted and the first line of the Reasons for the Sanction in the Notice of Limited Denial of Participation shall instead read "You have failed to reimburse HUD for tenant security deposits for the Prince Hall Apartments."

## **FINDINGS OF FACT ON PROPOSED DEBARMENT**

### *The Tenant Security Deposit Account*

#### Disputed Material Facts:

1. Whether Respondent failed to maintain the Project's tenant security deposit account in accordance with the requirements of the Department, pursuant to paragraph 9(d) of the Regulatory Agreement and HUD Handbook 4350.3 Chg-22, ¶ 4-10.

*Finding of Material Fact:* Yes, Respondent failed to maintain the tenant security deposit account and records in accordance with the requirements of the Regulatory Agreement and the HUD Handbook. His failure to maintain a tenant security account is established by his repeated failure to provide evidence that he did so.<sup>4</sup>

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<sup>4</sup>Respondent blames the bankruptcy proceeding for his inability to comply with HUD's requests for an accounting. He claims that all records were turned over to the Trustee in Bankruptcy and that all accountings had to be made to the Trustee. HUD Respondents cannot use bankruptcy to shield them from their obligations under the

2. Whether Respondent failed to respond to HUD's January 28, 1998 demand that \$16,836 in missing tenant security deposit funds be remitted to HUD.

*Finding of Material Fact:* Yes, Respondent failed to respond to the demand. Respondent admits that he did not respond to the January 28, 1998 demand letter.

*Subsidiary Findings of Fact:* Under the terms of the Regulatory Agreement, Respondent agreed that "any fund collected as security deposits shall be kept separate and apart from all other funds of the project in a trust account the amount of which shall at all times equal or exceed the aggregate of all outstanding obligations under said account." Govt. Ex. A., ¶ 6(g). HUD Handbook, 4370, Rev-1, Chapter 2, Section 9, entitled "Security Deposit Account," also requires that a separate bank account be established to maintain security deposit funds, and that those funds not be comingled with any other funds. It further requires that all disbursements from the security deposit account be supported by approved invoices, bills, or other documentation, and that disbursements are made only for refunds to tenants and payment of appropriate expenses incurred by the tenant. Respondent did not comply with these provisions.

Respondent ceased to be the owner of the property once HUD foreclosed on it and the bankruptcy court validated the foreclosure on October 31, 1995. He, therefore, had no obligation to continue to collect security deposits or monitor them after October 31, 1995. He did, nonetheless, have a continuing obligation to safeguard and account for any security deposit monies he had collected prior to October 31, 1995. He also had a continuing obligation to maintain them in an appropriate account with valid records and to turn those monies and records over to HUD subsequent to the October 31, 1995 bankruptcy ruling. Finally, he had an obligation to safeguard and account for any security deposits he might have collected after October 31, 1995, if he did indeed collect any. He failed to meet these obligations.

### *Transfer of Physical Assets*

#### Disputed Material Fact:

1. Whether there was a failure to satisfactorily complete the Transfer of Physical Assets ("TPA") process prior to transferring ownership of the project pursuant to paragraph 6 of the Regulatory Agreement.

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Regulatory Agreement. *United States v. Harvey*, 68, F. Supp. 2d 1010 (S.D. Ind. 1998). Indeed, in this case such a result would be unconscionable because Respondent expressly agreed not to invoke bankruptcy in both the Regulatory and Workout Agreements. Govt. Ex. 6, ¶ 8; R. 16 ¶ 1.

*Finding of Material Fact:* Yes, Respondent failed to satisfactorily complete a Transfer of Physical Assets process as required by the Regulatory Agreement.

*Subsidiary Findings of Fact:* Paragraph 6 of the Regulatory Agreement provides that: Owners shall not without the prior written approval of the Commissioner: (a) Convey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer or encumbrance of the property. . .” Govt. Ex. 6. As a condition of loaning \$300,000, secured by a third mortgage to the City of Birmingham, the city required, among other things, that the mortgagor be either an individual or a partnership, not a corporation. Accordingly, Respondent, the sole owner of Perimeter Investments, a corporation, deeded Prince Hall to himself. The deed was not recorded. In a second transaction, Mr. Stewart, as individual owner conveyed Prince Hall to “Perimeter Partnership” (a partnership with only one partner, Perimeter Investments, the Corporation). This conveyance, which was recorded, evidently satisfied the City of Birmingham which then loaned the money. *See* Memorandum Opinion and Order, *Perimeter Investments, Inc., v. United States Department of Housing and Urban Development*, AP Case No. 95-00020 (N.D. Ala. 1995); Tr. I, pp. 64-66. Unfortunately, Respondent never informed HUD of each “Transfer of Physical Assets.” Because these transactions constituted a “conveyance or transfer” of the property, the Regulatory Agreement required Respondent to notify HUD and to obtain its approval.

The HUD Alabama Office was aware of and approved Respondent’s application to the City of Birmingham for the second mortgage. Accordingly, Respondent did not “encumber” the property without permission. In fact, the City of Birmingham sent HUD a letter in which it listed the conditions upon which their loan commitment to Respondent would rest. Resp. Ex. 4. In this list was included the requirement that the property be owned by an individual or partnership. From this letter, HUD could reasonably have been presumed to have been aware of the requirement that the property be owned by an individual or partnership. However, HUD could not have been imputed to know how Respondent would deal with this requirement, if at all. Respondent clearly did not apply to HUD to transfer the physical assets to the new entity, something he could easily have done. Govt. Ex. 14; Tr-I, pp. 67-68; Tr-II, pp. 167-174. HUD learned of the transfer only in December 1994, when it ordered an owner’s title commitment for the property in preparation for the foreclosure.<sup>5</sup> Tr. I, pp. 51-53.

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<sup>5</sup>Following the bankruptcy filing, Respondent sued HUD in United States District Court seeking sanctions for HUD’s purported violation of the automatic stay imposed during the bankruptcy proceeding. HUD had attempted to foreclose during the period of the automatic stay in reliance upon a title search that revealed that Prince Hall was owned by a partnership and was no longer owned by Perimeter Investments, the Corporation and bankrupt estate. Attempting to obtain sanctions against HUD, Respondent claimed that his conveyances to himself and to the “partnership” were void in part because they violated the Regulatory Agreement. Denying the Motion the Court stated: “(T)his court can not allow [Perimeter Investments] to benefit from its own violation of the regulatory agreement or its own mistakes or wrongdoing. *Memorandum and Order, Perimeter Investments v. United States Department of Housing and Urban Development*, AP Case. No. 95-00020 (N.D. Ala. 1995).

Respondent was aware, or should have been aware, of the requirement that he apply for a TPA prior to obtaining the second mortgage. Not only did the Regulatory Agreement impose this requirement, but the HUD Alabama Office reminded him that he had submitted a TPA when he first acquired Prince Hall. On October 29, 1991, Mr. Ruggs, the Director of the Housing Management Division, wrote Respondent stating that the HUD Alabama Office had no objection to the City of Birmingham's assuming a second mortgage position. Coincidentally, the same letter states that "in another matter concerning the workout agreement, we have been unable to locate the documents involving the Transfer of Physical Assets (TPA) that occurred in 1988. Please send copies of [the 1988 TPA documentation]." Govt. Ex. 14.

### *Failure to Maintain the Project*

#### Disputed Material Fact:

1. Whether there was a failure to maintain the project in good repair and condition pursuant to paragraph 7 of the Regulatory Agreement.

*Finding of Material Fact:* Yes, there was a failure to maintain the project in good repair and condition pursuant to paragraph 7 of the Regulatory Agreement.

*Subsidiary Findings of Fact:* Paragraph 7 of the Regulatory Agreement states: "Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition." Govt. Ex. 6. Following a March 3, 1994, review of the project, HUD prepared a Failing Project Checklist enumerating the causes and Respondent's responsibilities for the project's shortcomings. The inadequacies included: failure to meet the terms of the 12 month workout; inability to provide a fidelity bond due to an Internal Revenue Service lien of \$100,000 for nonpayment of payroll taxes; an underfunded tenant security account; and failure to make agreed upon repairs to the project. Govt. Ex. 7.

On July 2, 1994, units in Building #3 of the project were flooded with raw sewage. Five families were evacuated by the Red Cross. According to one of the tenants, who contacted the resident manager, as late as July 6<sup>th</sup>, no action had been taken to stop the flooding or repair the damage. Displaced tenants were temporarily placed in a hotel, after which "the families were required to find shelter elsewhere." Letter dated July 13, 1994, from Gail Redwine to Otis Stewart, Govt. Ex. 9. Respondent replied that the problem was caused by tenants placing foreign objects in the sewer line and that as of July 13, 1994, the problem was solved, that clean up was in progress, and that residents would be compensated for any loss. Memo dated July 13, 1994, from Richard Finley to Gail Redwine, Govt. Ex. 9.

A July 20, 1994, HUD Physical Inspection Report identified numerous serious safety and health deficiencies and provided an estimated cost of repairs in the amount of \$483,615. The report indicated that the power company had disconnected electricity to one of the buildings as a result of a sewer backup (see above). As a result, one tenant tapped into a neighbor's power line. Photographs attached to the report identify inoperable vehicles on the property, weeds growing out of gutters, rotted stairways, unrepaired fire damage to some units, uncollected garbage, an exposed electrical connection at an air conditioner unit, and vacant units that were not cleaned after the tenants moved out. Govt. Ex. 8.

Tenants complained orally and in writing to HUD about living conditions at Prince Hall throughout 1993 and 1994. I have quoted several examples.

Since moving into the new apartment in May 1994, repairs have never been made. Rental for the apartment is \$270.00 each month. Maintenance has been nonexistent and living conditions are awful. I have complained on numerous occasions, and never received an answer or a solution to my predicament.

My grievances:

- Kitchen cabinets are hanging from the wall
- Cabinets were never replaced
- Bathroom sink fell off the wall - - - never reconnected
- No air conditioning during summer
- Heating systems not working
- Heating systems wires not attached
- Leaking roof - - - which causes water to enter through light fixtures
- I purchased my own refrigerator and stove (not provided with apartment - - - never reimbursed)
- Baseboards are loose/never replaced
- Water has been completely shut off in second bathroom
- Blinds never replaced
- Broken window never replaced

I am the Mother of four children. We have not had the pleasure of heat and air conditioning since moving into the Prince Hall Apartments.

Letter dated December 19, 1994, from Larrethau Latham to Herman Ransom, Govt. Ex. 9.

I need my air conditioner checked. I've called Prince Hall office at least four times and no result.

I wouldn't make and (sic) issue out of it[,] but I take medication for my nerves, plus diabetes and staying cool is a matter of health.

Letter (undated - received by HUD on August 29, 1994) from Cathy Watson to Sarah Richey, Govt. Ex. 9.

My name is Cathy Gray and I'm writing to you because I do not have air conditioning in our apartment. It has been out over a month. I was told that Mr. Stewart and the (illegible) was waiting on insurance to replace it. Right now I'm using a window unit that my mother brought me from her home because I have high blood pressure. It is still very hot in here and when it gets in the (illegible) outside it is extremely hot in here. I have to bake most of my meats (sic) that I eat and this heat is making it impossible to cook this way. I have suffered two sick spells because of this heat.

We have a commode that has cracked opened (sic) from the bottom all the way to the top. I told Ann about the commode leaking under the bottom about two months ago. I was told by her that J.R. (the maintenance man, see below) was looking out for one but it never arrived. The commode is so old it looks like its (sic) been here as long as the apartment. There is (sic) stains around the inside bowl that we can't clean up no matter what you use. . . . One morning I arose and put my feet on the floor and found out I was standing in water. I went into the bathroom and discovered that the top of the bowl had cracked all the way down the side and water was gushing out the crack. Next I discovered electrical cords were laying in the water also. . . . (three weeks later) I told Ann that we needed two (commodes), but she said I can only have one right now.

Please help us and the other families that are suffering from the neglect of Mr. Stewart who is always out of town when you need him.

Letter dated August 11, 1994, from Cathy Gray to Sarah Richey, Govt. Ex. 9.


HUD referred these tenant complaints to Respondent, requesting that he follow them up and report his findings to HUD within 10 days. Govt. Ex. 9. Respondent failed to do so.

Following a July 20, 1994, interview with the project's maintenance man, J.R., HUD employee, Sarah Richie reported that J.R. told her that "he did not have the proper tools or supplies to do anything at the complex", that "he had asked for supplies but they are not given to him," and that he could have stopped the sewage backup if he had had a "sewage snake" in working condition. For whatever reason, Mr. Stewart did not attend a meeting scheduled to discuss the July 20<sup>th</sup> inspection. Rather he sent Griselda McCoy in his place. Ms. McCoy had no experience working with the property other than completing the Monthly Accounting Reports. Memo dated July 21, 1994, from Sarah Richie to Gerald Beard, Govt. Ex. 9.

#### Additional issues

Respondent (an African-American) and Richard Finley, an outside business advisor Respondent had hired to help him work with HUD, made allegations of racial discrimination and favoritism in HUD's handling of the project and Respondent's efforts to save it during the hearing on the above issues. The favoritism allegations revolved around allegations that HUD attempted a quid pro quo arrangement -- that Respondent hire a former HUD official as advisor in exchange for things going more smoothly with

the project. HUD denies the allegations. Without exception, the employees of the HUD Alabama state office have also denied these allegations. I have made a record for the debarring official's assessment of the merits of these contentions. Some, if not all, of the assertions of discrimination may be barred from being raised in this forum under the principles of *res judicata*, as they appear to have been addressed already in federal district court proceedings in Alabama. See Memorandum of Opinion and Order in *Stewart v. Cisneros*, CV-95-N-0121-S (N.D. Ala. 1996), included in Letter from David A. Sullivan to Judge Cregar as Exhibit "2," September 11, 2001.

  
WILLIAM C. CREGAR  
Acting Chief Administrative Law Judge